No. 15140

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERTHA TATUM,

Appellant,

vs.

OSCAR TATUM, VAL GENE TATUM, and RUBY FAY JOHNSON,

Appellees.

APPELLANT'S REPLY BRIEF.

ARTHUR N. GREENBERG,
1200 C. C. Chapman Building,
756 South Broadway,
Los Angeles 14, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Textbooks

No. 15140

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Statement of the Case.

Appellees inadvertently made a number of errors in the Summary of Material Facts in their brief. These are called to the Court's attention as follows:

1. Appellees on page 4 of their brief state that Mattie obtained an allotment from Erwin "as a serviceman's wife." Mattie testified that she was paid an allotment while Erwin was in the service [Tr. p. 140]. However. nowhere in the record does it appear whether said allotment was awarded to Mattie for the support of Erwin's minor children, or otherwise.

2. Appellees state on page 4 of their brief that appellant was denied a military allotment on the ground that she was not Erwin's wife. This is contrary to the record. Appellant testified that the reason she was denied an allotment was because she was unable to furnish the Army with a copy of Erwin's divorce decree from Mattie [Tr. p. 204].

3. Appellees state on page 6 of their brief that Erwin executed a property settlement agreement with Mattie on October 7, 1948, stating therein that he and Mattie were then husband and wife. However, the agreement stated that it was entered into by Erwin as one of the parties who was "hereinafter referred to as the husband." Such a reference to Erwin was merely *descriptio personae* and not a statement that he was then the legal husband of Mattie.

4. Appellees state on page 8 of their brief that appellant told one Mrs. Barnes that she was not married to Erwin. Examination of the record reveals that such statement was not made with reference to Erwin:

> "Q. Did you overhear a conversation between Bertha Tatum and Mrs. Mabel Barnes? A. I did.
>
> Q. Will you tell the Court, please, what that conversation was? A. Well, Mrs. Barnes asked her if they were married and she told her no, and she said, 'You should have made him marry you.'" [Tr. p. 152.]

The person referred to in the conversation is not identified in the record.

ARGUMENT.

I.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, Because She Is the Widow of Said Insured by Virtue of the Ceremonial Marriage Entered Into on May 19, 1943.

In their brief, appellees apparently admit that the burden of proof was upon them to establish:

1. That the alleged 1927 marriage between Erwin and Mattie was valid, and
2. That said marriage, if valid, had not been dissolved by divorce or annulment at the time of the ceremonial marriage between Erwin and appellant.

Appellees apparently concede that there is no evidence establishing whether, at the time of the alleged 1927 marriage between Mattie and Erwin, said parties were competent to contract marriage to each other. Moreover, appellees assert in the instant action that the entering into of a marriage ceremony between Erwin and appellant was insufficient to make said marriage valid. Accordingly, the entering into of a marriage ceremony between Erwin and Mattie was likewise insufficient to make said prior marriage valid. Thus, Mattie's alleged marriage to Erwin is presumed invalid in the absence of evidence to the contrary. There is no such evidence in the record.

However, assuming *arguendo* that Mattie's 1927 marriage was valid, appellees assert that they have established that said marriage was not terminated by divorce or an-

nulment prior to the May, 1943 ceremonial marriage between Erwin and appellant. Appellees contend that the following evidence is sufficient to rebut the presumption that said prior marriage had not been dissolved:

1. The execution by Erwin on October 7, 1948, of the property settlement agreement with Mattie. Appellees urge on page 10 of their brief that the property settlement agreement stated that Erwin and Mattie were husband and wife. However, the property settlement agreement merely described Erwin for purposes of said agreement as "husband." Use of the term "husband" was merely *descriptio personae*. Such language, as a matter of law, was not an intimation that it was to apply to Erwin in the technical class of Mattie's husband.

26 C. J. S. 1235;

Black's Law Dictionary (3d Ed.), p. 564.

Thus the agreement was not a declaration by Erwin that he was then Mattie's legal husband. If the language of the agreement had specified that Erwin was to be thereinafter referred to as "ambassador," no one could seriously contend that Erwin agreed that he was then an ambassador.

2. Appellees argue that Erwin's resumption of marital relations with Mattie established that they were then married. However, since appellees contend that marital relations between Erwin and appellant did not establish their marriage, likewise Erwin's relations with other women would not establish any other marriage.

3. Appellees assert that since appellant's allotment was denied, Erwin and Mattie must have been still married. However, such argument overlooks the fact that the only

reason that an allotment was denied appellant was because she failed to produce Erwin's divorce decree from Mattie. Such failure established non-compliance with military regulations, not illegality of her marriage to Erwin.

4. Appellees assert that, since Mattie received an allotment, she must have been the wife of Erwin. Again, this argument overlooks the fact that the evidence does not establish the nature of the allotment received by Mattie.

5. Appellees assert that Mattie was never served with divorce papers. However, this does not establish that Mattie was not served with annulment papers prior to said date, nor that Erwin could not have procured a valid divorce without personal service upon Mattie.

6. Finally, appellees assert that Erwin's oral declarations were sufficient to establish the invalidity of his marriage to appellant. With respect to said contention, the United States Supreme Court, in *Gaines v. Relf* (1851), 53 U. S. 472, 533, stated that:

> ". . . To hold that either of the parties could, by a mere declaration, establish that a marriage was void, would be an alarming doctrine."

Thus, appellees, as a matter of law, have failed to rebut the presumption of validity of the ceremonial marriage between Erwin and appellant.

The Fifth Circuit recently upheld the presumption of validity of ceremonial marriage in awarding the proceeds of a National Service Life Insurance policy, in *United States v. Marlow* (1956), 235 F. 2d 366, a fac-

tually stronger case than the instant one. The court stated as follows on page 368:

> "It appears without contradiction that the two were united in a ceremonial marriage under proper certificate on February 7, 1942. Both parties lived in California, and it is agreed that the validity of the marriage is to be determined under the law of that state. Under that law and under the general law such a marriage is presumed to have been legal and valid and one asserting its invalidity bears the burden of proving such invalidity.
>
> "The United States contends, on behalf of Mary, that a marriage once established is presumed to continue. But this presumption is displaced by the presumption of the validity of a second marriage; and to overcome the latter presumption *positive proof* must be adduced to establish that the prior marriage was never dissolved by judicial decree or death." (Emphasis added.)

In the instant action, appellees have failed to introduce such *positive proof* as required by law to rebut the presumption of validity of the 1943 ceremonial marriage between Erwin and appellant. Accordingly, the findings of fact and conclusions of law in conflict with the presumption are erroneous. Specifically, finding No. 4 that, at the time of said ceremonial marriage, there was a superseding undissolved marriage between Erwin and Mattie, finding No. 9 that the marriage between Erwin and Mattie was dissolved by final judgment of divorce, finding No. 10 that in October, 1948, Erwin and Mattie executed a property settlement agreement declaring that they were husband and wife, finding No. 12 that appellant was aware of the fact prior to September, 1948, that Erwin had a living undivorced wife, and finding No. 16

that the allegation of plaintiff's complaint that she was the widow of Erwin was untrue, are not supported by the evidence [Tr. pp. 58-60].

Moreover, conclusion No. 1 that Erwin lacked legal capacity to enter into the ceremonial marriage of May 19, 1943, and that said ceremonial marriage was null and void, conclusion No. 5 that appellant is not the lawful widow of Erwin, conclusion No. 7 that appellees are entitled to the benefits of said insurance policy, and conclusion No. 8 that plaintiff take nothing by her complaint, are contrary to the law set forth herein [Tr. pp. 61-62].

II.

Appellant Is Entitled to the Insurance Proceeds on the Life of Erwin Tatum, Deceased, as the Widow of Said Insured by Virtue of a Texas Common Law Marriage Entered Into Subsequent to the 1949 Divorce Between Mattie and Erwin.

Even if her ceremonial marriage was void, appellant is the legal widow of Erwin by virtue of a Texas common law marriage occurring subsequent to 1950.

Although the trial court repeatedly questioned whether a California domiciliary could contract a Texas common law marriage, appellees apparently concede that this is no longer an issue on page 15 of their brief.

On the other hand, appellees assert that common law marriage is a question of agreement and that the evidence established, and the trial court found, no agreement.

However, binding Texas authority conclusively sets forth that common law marriage can be created in the absence of agreement. *Curtin v. State* (1950), 155 Tex.

Cr. 625, 238 S. W. 2d 187, holds that a common law marriage occurs where the parties contract an invalid marriage in good faith and cohabit as husband and wife after removal of the impediment to said marriage.

See, also:

Consolidated Underwriters v. Taylor (1946), 197 S. W. 2d 216.

In this case, appellant in good faith entered into a ceremonial marriage. Even if said ceremonial marriage was void, the parties cohabited together as husband and wife in Texas after Mattie's California divorce removed the impediment to the validity thereof. Since domicile apparently is no longer an issue, the doctrine of *Curtin v. State* would apply and thus a common law marriage was created.

Appellees seek to avoid the impact of the *Curtin* case by arguing that such is not the holding thereof. However, the rule enunciated herein and in appellant's opening brief was the *law* of the case pronounced by the Court, on page 192, in overruling a motion for rehearing. The Court merely quoted the general doctrine announced in 55 C. J. S. 881, 882.

Appellees, however, quote the following language on page 19 of their brief: ". . . to prove as a matter of fact that they intended their relationship to be marital." Appellees thus argue that the decision of the *Curtin* case rests upon an implied in fact contract and not one implied in law by reason of removal of impediment.

However, the above excerpt comes from 238 S. W. 2d 187, where the Texas appellate court itself quoted an earlier decision of said court. However, the portion quoted by appellees is not the holding of the *Curtin* case.

Accordingly, under the doctrine of the *Curtin* case, a common law marriage as a matter of law was created upon cohabitation by appellant and Erwin in Texas as husband and wife after 1950.

Moreover, assuming *arguendo* that appellees' position is correct and that there must be an express or an implied in fact agreement, the evidence unequivocally established that there was such an agreement.

After Mattie's divorce, Erwin and appellant resided in Texas for periods of time [Tr. pp. 165, 167, 213]; Erwin sought employment in Texas and appellant and Erwin intended to domicile in Texas should Erwin find a job [Tr. pp. 164-166, 210]; while in Texas, they cohabited and held themselves out to the public as husband and wife [Tr. pp. 167-171]; during their sojourn in Texas they lived together, registered at motels as husband and wife [Tr. pp. 167-169] and received mail addressed to them as "Mr. and Mrs. Erwin Tatum" [Pltf. Ex. 6; Tr. p. 171].

Moreover, Erwin and appellant while in Texas discussed their relationship in the light of Mattie's California divorce. Appellant told Erwin that it was time for them to "fix this over". Erwin answered that there was no need because he was already married to her in Texas and that he was her husband. Appellant agreed [Tr. pp. 166-167, 200-201]. Moreover, the parties believed that they were married in Texas [Tr. pp. 8, 205-206].

Under these circumstances, the evidence clearly establishes both an express and implied agreement to become husband and wife in Texas.

Appellees next quote 2 Beale on Conflicts of Law 675, to the effect that domiciliaries of one State cannot acquire

a common law marriage by temporarily living together in a common law marriage State. However, this question is to be determined under California law and the California courts have held that California domiciliaries can acquire foreign common law marriage.

See:

Estate of McKanna (1951), 106 Cal. App. 2d 126, 234 P. 2d 673.

Thus the trial court's finding No. 12, that appellant and Erwin did not agree to become husband and wife in Texas, is directly contrary to the evidence and conclusion No. 4, to the effect that appellant and Erwin did not become husband and wife after November 30, 1949, is contrary to both the evidence and the doctrine of the *Curtin* case [Tr. pp. 60, 61].

III.

Appellant Is Entitled to the Insurance Proceeds on The Life of Erwin Tatum, Deceased, as the Putative Spouse of Said Insured.

Appellees concede, on page 23 of their brief, that if appellant was the putative spouse of Erwin, she would be entitled to the insurance proceeds in this case as Erwin's lawful widow.

Appellees next argue that, from the date appellant learned of Mattie's 1949 divorce from Erwin, she ceased having the status of putative spouse.

However, the uncontradicted testimony is that after appellant learned of Mattie's divorce she prevailed upon Erwin to rectify the situation. Erwin told her there was no need because he was already married to her in Texas

and that he was her husband. Thereafter, appellant believed that she was married to Erwin [Tr. pp. 8, 166-167, 184-185, 200-201, 205-206, 209].

Thus, after Mattie's 1949 divorce appellant believed that she was married to Erwin. The record overwhelmingly establishes that such was a good faith belief. Since the basic element of a putative marriage is the good faith belief in a valid marriage, appellant was the putative spouse of Erwin whether that putative marriage had its origin at the time of her ceremonial marriage or after Mattie's 1949 divorce.

> *Valera v. Valera* (1943), 21 Cal. 2d 681, 684, 134 P. 2d 761.

Accordingly, the trial court's conclusion No. 2, that appellant is not entitled to the status of putative spouse, is not supported by the evidence [Tr. p. 61].

Conclusion.

The judgment should be reversed and judgment should be ordered in favor of appellant.

Respectfully submitted,

ARTHUR N. GREENBERG,
Attorney for Appellant.